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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN ESTEBAN LOPEZ,

Defendant and Appellant.

F062621

(Super. Ct. No. BF115450A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Cornell, J. and Poochigian, J.

Martin Esteban Lopez was convicted of various crimes described in more detail in the companion appeal (*People v. Lopez* (June 26, 2012, F059831) [nonpub. opn.]). He was released from custody at the sentencing hearing because the custody credits he earned exceeded the sentence imposed (Pen. Code, § 1170, subd. (a)(3)) (hereafter section 1170(a)(3)).<sup>1</sup> While Lopez’s appeal from the conviction was pending in this court, the trial court held a hearing and placed Lopez on parole and ordered him to report to the parole office. In addition, it calculated the parole termination date from the date of the hearing.

Lopez appeals, arguing the trial court did not have jurisdiction to place him on parole because of the pending appeal. We conclude that the trial court erred in two respects. First, section 1170(a)(3) mandates that all convicted defendants serve a term of parole when their custody credits exceed the sentence imposed at the sentencing hearing. Therefore, Lopez was on parole after the sentencing hearing, even though the trial court failed to inform him of this fact. Second, the trial court erred in calculating Lopez’s parole termination date since his parole began at the sentencing hearing and not at the later hearing. We will remand the matter to allow the trial court to calculate the correct parole termination date.

### **FACTUAL AND PROCEDURAL SUMMARY**

The jury convicted Lopez of violating sections 243, subdivision (d), 288 subdivision (c)(1), and 242 on November 13, 2009. Because the time spent in custody before trial likely exceeded any sentence that would be imposed, Lopez was released on his own recognizance on November 20, 2009.

Lopez was sentenced on March 15, 2010, to a term of four years eight months. At the time sentence was imposed, Lopez had earned custody credit totaling 2,108 days. Since the custody credits exceeded the sentence, Lopez’s sentence was deemed served in

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<sup>1</sup>All further statutory references are to the Penal Code unless otherwise stated.

full. The trial court did not order Lopez to report to the parole office or indicate that he was serving a term of parole.

Shortly after the sentencing hearing, Lopez was arrested by parole agents, allegedly for failing to report to the parole office after sentencing. Parole officers released Lopez after determining he had not been ordered to report to the parole office.

Approximately one year later, Lopez again was arrested by parole agents for a purported parole violation. This arrest resulted in Lopez asking the trial court to resolve the question of his parole status.

On May 17, 2011, the trial court concluded that it had erred at the sentencing hearing when it failed to put Lopez on parole and modified his sentence to order him to report to the parole office until the time spent in custody and on parole equaled seven years eight months (his sentence plus the statutorily required three years on parole).

### **DISCUSSION**

Lopez argues the trial court erred when it modified his sentence to include a term of parole. The essence of Lopez's argument is that because a notice of appeal had been filed, the trial court was divested of jurisdiction to resentence him. The People assert there was no error because the trial court was merely correcting an unauthorized sentence. We reject the approaches proposed by the parties.

We begin with section 1170, the specific code section that applied to the sentencing of Lopez. When the custody credits exceed the sentence imposed, section 1170(a)(3) provides that "the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary." The trial court correctly recognized the applicability of this provision when it released Lopez prior to the sentencing hearing and when it imposed sentence.

The trial court erred at the sentencing hearing in two respects because once the trial court determines that the defendant's sentence is deemed served in full, section 1170(a)(3) requires the trial court to "advise the defendant that he ... shall serve a period

of parole,” and also “order the defendant to report to the parole office closest to the defendant’s last legal residence.”

The parties assume these errors resulted in Lopez being free from parole after the sentencing hearing, but we disagree. The trial court’s failure to advise Lopez he would serve time on parole did not affect Lopez’s parole status because the trial court did not have “the authority to alter the legislative mandate” that imposed parole on Lopez. (*People v. McClellan* (1993) 6 Cal.4th 367, 380.) The statute does not require the trial court to place the defendant on parole. Instead, the trial court simply is required to *inform* the defendant he or she is on parole. Accordingly, Lopez was on parole after the sentencing hearing pursuant to the mandate of the statute.

The trial court did not have any discretion to decide whether Lopez was to be placed on parole, nor to decide the length of any period of parole. (*Berman v. Cate* (2010) 187 Cal.App.4th 885, 894-895; *People v. Avila* (1994) 24 Cal.App.4th 1455, 1461; *People v. McMillion* (1992) 2 Cal.App.4th 1363, 1369.) In other words, the relevant statutes imposed a term of parole on Lopez and determined the length of that term of parole. Absent exceptional circumstances, a period of parole automatically follows incarceration in the state prison or, in this case, release because the custody credits earned exceeded the sentence imposed.

Since the trial court had no discretion in the matter, we conclude Lopez was on parole at the conclusion of the sentencing hearing, even though he was not so advised by the trial court and even though the trial court failed to order him to report to the parole office.

We now turn to the proceedings in the trial court that occurred after the sentencing hearing. At the May 17, 2011 hearing, the trial court stated it was placing Lopez on parole. As we have explained, since Lopez already was on parole, this “order” did not change or affect Lopez’s status. Therefore, the trial court did not err when it informed Lopez he was on parole.

The trial court, however, also ordered Lopez to report to the parole office. To the extent Lopez asserts the trial court did not have the authority to do so, we disagree. While the parties agree that generally the filing of a notice of appeal divests the trial court of jurisdiction (Code Civ. Proc., § 916, subd. (a); *People v. Flores* (2003) 30 Cal.4th 1059, 1064; *People v. Johnson* (1992) 3 Cal.4th 1183, 1257), the general rule is subject to exceptions.

One well-established exception is that “an unauthorized sentence is subject to correction despite the circumstance that an appeal is pending.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044.) In *Cunningham*, the defendant was convicted of numerous crimes, including special circumstance murder. At the sentencing hearing, the trial court sentenced the defendant to death but did not impose sentence on the remaining counts. One month later, the trial court sentenced the defendant on the remaining counts. A notice of appeal had been filed before the second sentencing hearing. The Supreme Court rejected the defendant’s claim that the trial court could not sentence him on those counts because it had lost jurisdiction over the matter. “Because the trial court was not authorized simply to waive sentencing on these counts, any error in failing to impose sentence in this regard would have been subject to judicial correction when it ultimately came to the attention of the trial court or this court. [Citations.]” (*Id.* at pp. 1044-1045.)

To the extent the trial court failed to order Lopez to report to the parole office, we conclude the sentence was unauthorized. As in *Cunningham*, the trial court failed to perform a statutory sentencing obligation. Since this portion of the sentence was unauthorized, the trial court could correct it after the notice of appeal was filed.

Finally, the trial court also concluded at the May 17, 2011, hearing that Lopez’s period of parole began on that day. As we have explained, Lopez was on parole since the sentencing hearing. Accordingly, that trial court erred. This error is significant because Lopez had accumulated custody credits in excess of his sentence. As the trial court and the parties recognized, the excess custody credits are to be credited against the period of

parole. (§ 1170(a)(3).) Because the trial court erroneously deprived Lopez of approximately one year of credit for time already spent on parole, its calculation of the amount of time Lopez would remain on parole was incorrect. Therefore, remand is necessary to recalculate the date on which parole will expire.

#### **DISPOSITION**

The trial court's order placing Lopez on parole as of May 17, 2011, is reversed. The order requiring Lopez to report to the parole office is affirmed. The matter is remanded to the trial court to permit it to determine the date on which Lopez's parole will end after all applicable custody credits are applied as required by law.